

Business Law Section



State Bar of Wisconsin

Wisconsin Lawyers. Expert Advisers. Serving You.

To: Assembly Committee on Jobs, the Economy and Small Business

From: Business Law Section
State Bar of Wisconsin

Date: May 12, 2009

Re: Support for Assembly Bill 202 – Repeal of Bulk Sales Law—

The Business Law Section of the State Bar of Wisconsin **strongly supports Assembly Bill 202** relating to the repeal of the bulk transfer provisions found in Article 6 of the Uniform Commercial Code (UCC) in order to provide equity to *all* parties - buyers, sellers and creditors of an affected business transaction. We especially want to thank Representative Cullen and Senator Risser for their help in forwarding this legislation.

Background

The repeal of Article 6 was recommended in 1989 by the National Conference of Commissioners on Uniform State Laws and the American Law Institute; that recommendation was also supported at the national level by the American Bar Association. To date, 46 other jurisdictions have enacted the repeal without any noticeable dislocation of business practices.

Two other states (California and Virginia) - and the District of Columbia have also adopted a revised Article 6. Wisconsin should repeal Article 6 simply to modernize its business laws.

How Did The Article 6 Notice Provision Originate?

The bulk transfer provision, Article 6 of the Uniform Commercial Code, states that notice must be given to creditors if a seller will be making a large sale of inventory (i.e., a bulk transfer). Decades ago the provision was originally enacted to catch the "fly by night" merchant who, usually in collusion with a buyer, would sell off large parts of inventory. Both would then disappear with the profits into the darkness of the night, leaving creditors unpaid and in the lurch. *At that time*, the provision was needed to provide a level of protection against the acts of the unscrupulous merchant.

Why Should The Notice Provision Be Repealed Today?

First, the Business Law Section believes that the business environment and laws of today offer more remedies and protections than in the decades of yesteryear. The notice provision is no longer necessary, because there are other protections against loss and fraud available to suppliers of inventory that are available under today's laws. These include:

- Cheap and readily available credit reports.
- Security interest laws; a supplier can, for example, take a UCC Purchase Money Security Interest in all inventory supplied.

State Bar of Wisconsin

5302 Eastpark Blvd. ♦ P.O. Box 7158 ♦ Madison, WI 53707-7158

(800)728-7788 ♦ (608)257-3838 ♦ Fax (608)257-5502

Internet: www.wisbar.org ♦ Email: service@wisbar.org

- The Uniform Fraudulent Transfer Act (Chapter 242 Wis. Stats.), which gives much greater protection against sales of inventory at less than fair value. This is the real, legitimate protection against transfers that are unfair to creditors, and it provides better remedies, without jeopardizing the legitimate transaction.
- Unpaid creditors can sue the seller under the state "Long Arm" jurisdiction statute. Even if a seller attempts to "abscond" to another state with the proceeds of a Bulk Sale, Wisconsin's "Long Arm" will follow. (That was not the case years ago.)

Second, the Business Law Section believes that the protection under Article 6, which may have been necessary decades ago, is an inequitable burden on legitimate business transactions, which was never its intent. Inequity results from the following:

- The bulk notice provision places an undue burden (in legitimate business transactions) on a third party buyer who has had no previous relationship to the seller's creditors, because the remedy is against that buyer.
- The bulk transfer statute places the burden of compliance on the innocent buyer. If the buyer doesn't comply, it risks having to pay twice for the goods. This occurs even if there is a technical violation of the statute, as the current law makes the transfer "ineffective" if there is non-compliance with the notice provisions.
- The bulk transfer statute is a trap for the unwary buyer who may not even be aware of its existence, particularly in small transactions, and especially because almost all other states have rescinded the law.
- In large acquisitions, the buyer must send notices, by registered or certified mail, to all the seller's creditors, often numbering in the thousands.

Third, the Business Law Section believes that the notice provision has become largely ineffective in general day-to-day business transactions for these and other reasons:

- It applies only to businesses that sell inventory from stock; it doesn't protect creditors of service businesses (except taverns). The more our economy becomes a service economy (as it is), and the more businesses consist of intangible assets (as they are), the less relevant the bulk sales law is.
- It provides creditors only 10 days notice that the sale will occur -- too short a time to do anything -- and there isn't anything to do anyway, because the statute doesn't provide for anything to be done. As stated above, the real remedy for creditors is the Uniform Fraudulent Transfers Act.

Summary

The bulk transfer law should be repealed because creditors have other means of recourse under today's laws, the provision is ineffective, legitimate businesses can be unduly penalized, it is a trap for the unwary buyer and, the burden of compliance is now placed on the one party - the buyer - that has had no previous relationship with the seller's creditors. Simply put, the costs associated with keeping the statute is no longer justifiable or equitable in the context of today's business environment.

The Business Law Section urges your support of Assembly Bill 521.

For additional information contact Cale Battles, Government Relations Coordinator, at (608) 250-6077 or cbattles@wisbar.org.

The State Bar of Wisconsin establishes and maintains sections for carrying on the work of the association, each within its proper field of study defined in its bylaws. Each section consists of members who voluntarily enroll in the section because of a special interest in the particular field of law to which the section is dedicated. Section positions are taken on behalf of the section only.

The views expressed on this issue have not been approved by the Board of Governors of the State Bar of Wisconsin and are not the views of the State Bar as a whole. These views are those of the Section alone.